90-1480

Supreme Court, U.S.
FILED
JAN 28 1991
OFFICE OF THE CLERK

NO.

IN THE UNITED STATES SUPREME COURT

OCTOBER 1990 TERM

JAMES A. SCHULTZ,

Petitioner,

v.

THE UNITED STATES,

Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## Question Presented for Review

Whether the United States Court of Appeals for the Federal Circuit erred in upholding the decision of the United States Claims Court awarding costs to the United States as a "prevailing party" under Rule 54(d) of the Rules of the United States Claims Court, where the Petitioner prevailed in rebutting the presumption of correctness of a penalty assessment pursuant to 28 U.S.C. § 6672 in that petitioner filed a refund suit disputing the assessment of Twenty Thousand, Six Hundred Ninety-One and 38/100 Dollars ($20,691.38), and judgment was entered in favor of the United States in the reduced amount of Fourteen Thousand, Nine Hundred Fourteen and 50/100 Dollars ($14,914.50), in effect providing a refund of Five Thousand, Seven Hundred Seventy-Six and 88/100 Dollars ($5776.88)?

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## Opinions Delivered Below

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Schultz v. United States, Fed. Cir., Case No. 90-5065 (Oct. 31, 1990).

## Jurisdictional Statement

The Judgment of the Federal Circuit Court of Appeals sought to be reviewed by this court was entered on October 31, 1990.

This Court has jurisdiction of this matter pursuant to 28 U.S.C. §1254(1).

This Petition for Writ of Certiorari is timely pursuant to Rule 13.1 of the Rules of the United States Supreme Court.

## Governing Rules

Rule 54(d) of the Rules of the United States Claims Court states as follows:

**Costs**

Except when express provision therefore is made either in a statute of the United States or in these rules, cost shall be allowed as of course to the prevailing party unless the court ctherwise directs; but costs against the United States shall be imposed only to the extent permitted by law. RUSCC 54(d).

Statement of the Case

On or about January 27, 1987, Petitioner, James A. Schultz, filed a Complaint for refund of a One Hundred and No/100 Dollar ($100.00) payment made toward a penalty of Twenty Thousand, Six Hundred Ninety-One and 38/100 Dollars ($20,691.38) which was assessed against him pursuant to 26 U.S.C §6672. On June 30, 1987, Respondent, the United States, filed an Answer and Counter-Claim claiming the Petitioner owed Twenty Thousand, Six Hundred Ninety-One and 38/100 Dollars ($20,691.38) in unpaid taxes pursuant to 26 U.S.C. §6672. Pursuant to 28 U.S.C. §1491(a)(1) the Claims

Court had jurisdiction to hear the case and in an opinion reported at 19 Cl. Ct. 280, held that the Petitioner, James A. Schultz, was a responsible person who willfully failed to pay-over trust fund taxes and found Petitioner to be liable for taxes in the amount of Fourteen Thousand, Nine Hundred Fourteen and 50/100 Dollars ($14,914.50) and under Rule 54(d) of the Rules of the United States Claims Court awarded costs to the United States as "the prevailing party". On March 20, 1990, a Notice of Appeal was filed by the Petitioner. Oral arguments were heard by the Federal Circuit Court of Appeals on October 3, 1990. Pursuant to 28 U.S.C. §1295(a)(3) the Federal Circuit Court of Appeals had jurisdiction to hear the appeal.

An Opinion was filed by the Federal Circuit Court and Judgment was entered on October 31, 1990. In its Opinion, the court concluded that the analysis of "prevailing party" should have concentrated on the relief

requested by the Petitioner in his Complaint rather than the relief sought by the government in its Counter-Claim. Based upon the Claims Court finding the Petitioner a responsible party under 26 U.S.C. §6672, the Federal Circuit Court of Appeals affirmed the decision of the Claims Court awarding costs to the government as the "prevailing party" under Rule 54(d) of the Rules of the United States Claims Court.

## Argument

THE FEDERAL CIRCUIT COURT OF APPEALS ERRED IN UPHOLDING THE DECISION OF THE UNITED STATES CLAIMS COURT AWARDING COSTS TO THE UNITED STATES AS THE PREVAILING PARTY.

The Federal Circuit Court of Appeals has rendered a decision on an important question of Federal Law which has not been, but should be, settled by this court: Can the United States be a prevailing party under the language of RUSCC 54(d), where the taxpayer prevails in rebutting the presumption of

correctness of a tax assessment by having judgment entered in a refund suit for less than the assessed amount? Further, the decision of the court conflicts to a limited extent with the decision of the United States Court of Appeals for the Eighth Circuit in the case of Steele v. U.S., 280 F.2d 89 (8th Cir. 1960). To arrive at the conclusion the prevailing party was not the taxpayer, one would need to ignore the holding of Steele that it is possible to dispute the total assessment under 26 U.S.C. §6672 by filing a refund suit after paying only a portion of the tax assessed.

Rule 54(d) of the United States Claims Court provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." There is no dispute that one need not succeed on all issues to be found the prevailing party. See Austin v. Department of Commerce, 742 F. 2d 1417 (Fed. Cir. 1984) (further citations omitted). The

circuit court correctly focuses on the relief sought in the complaint but fails to recognize the petitioner as the prevailing party. It appears the court failed to recognize the presumption of correctness of the government's assessment.

The assessment by the government is presumptively correct and is prima facia evidence of the amount of a taxpayer's liability. Adams v. United States, 385 F.2d 986 (Ct. Cl. 1966). Given the presumption of correctness, the petitioner, in the instant case, had the burden of proving that the assessment was in error. The petitioner prevailed by rebutting the presumption of correctness and succeeding in his attempt to reduce the assessment. The lower court suggests that unless there is a complete victory by the taxpayer the United States is the prevailing party. (Appendix A-5). This holding is in direct opposition to the undisputed contention that one need not

prevail on all issues to be deemed the prevailing party. There can be no question that had the taxpayer paid the total assessment prior to filing his refund action, judgment would have been entered in his favor and therefore, he would have been found to be the prevailing party. Why should the result be different where the taxpayer, under Steele, supra., is allowed to dispute the assessment without making full payment prior to filing the action.

If the decision of the lower court is allowed to stand, a taxpayer disputing an assessment will always pay the government's costs unless the taxpayer succeeds in reducing the assessment to zero. Rule 54(d) of the United States Claims Court does not support such a conclusion.

Based upon the foregoing facts and the law cited, this Court should grant this Petition for Writ of Certiorari to the United States Court of Appeals for the Federal

Circuit.

Respectfully submitted,

B. GRAY GIBBS, P.A.

"ORIGINAL SIGNED by B. GRAY GIBBS"

B. GRAY GIBBS, ESQUIRE

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**PUBLISHER'S NOTE:**

**The following pages are unavailable for filming:**

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IN THE UNITED STATES CLAIMS COURT

No. 68-87T

(Filed: April 19, 1990)

* * * * * * * * * * * * * *

JAMES A. SCHULTZ,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

* * * * * * * * * * * * * *

ORDER

Pending is plaintiff's Objection to Bill Of Costs requesting that the court enter an order denying costs to the United States. Plaintiff urges that defendant is not the prevailing party within the meaning of RUSCC 54(D)[1] because while defendant's counterclaim

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[1]. RUSCC 54(d) states that costs "shall be allowed as a matter of course to the prevailing party unless the court otherwise directs. . . ." The counterpart Federal Rule of Civil Procedure contains identical language.

sought judgment against plaintiff in the amount of $20,691.38, only $14,914.50 was recovered. See 19 Cl. Ct. 280 (1990). Specifically, plaintiff notes that the court found the Government entitled to only one successful satisfaction of the 100% penalty assesment at issue. Plaintiff asserts that the government had already obtained $11,066.44 toward that satisfaction when it asserted its counterclaim[2], and that it therefore cannot qualify as a prevailing party. Plaintiff cites no cases in support of its motion and provides no further amplification of its argument.

A party will be considered the prevailing party and is entitled to costs even if it does not recover its entire claim. See, e.g., Thurner Heat Treating Corp. v. Mayfair Ford, 656 F. Supp. 1178, 1183 (E.D. Wis. 1987),

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[2]. The court did not so find. It held that the government had obtained successful satisfaction in the amount of $5,776.88.

aff'd 843 F.2d 500 (7th Cir. 1988) ("if prevailing party obtains judgment on only a fraction of the claims advanced, that party is entitled to an award of costs."); United States v. Mitchell, 580 F.2d 789, 793 (5th Cir. 1978) ("[a] party need not prevail on all issues to justify a full award of costs."); Lodges 743 and 1746, Etc. v. United Aircraft, 534 F.2d 422, 448 (2nd Cir. 1975) (in discussing Fed. R. Civ. Proc. 54(d), "[i]t is axiomatic that a plaintiff need not sustain his entire claim to be regarded as the prevailing party.") The court finds no support, and plaintiff has provided none, indicating that this well settled principle should be disturbed in the present case. Accordingly, the Government is the prevailing party and is entitled to award of costs.

It is so ORDERED.

/S/ ERIC G. BRUGGINK
ERIC G. BRUGGINK
Judge

IN THE UNITED STATES CLAIMS COURT

No. 68-87T

(Filed January 18, 1990)

* * * * * * * * * * * * * *

| | | |
|---|---|---|
| JAMES A. SCHULTZ, | * | Tax; I.R.C. § 6672; Duty to Collect |
| Plaintiff, | * | Trust Fund Taxes; "Responsible per- |
| v. | * | son"; Willfulness. |
| THE UNITED STATES, | * | |
| Defendant. | * | |

* * * * * * * * * * * * * *

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B. Gray Gibbs, St. Petersburg, Florida, for Plaintiff.

Robert N. Dorosin, with whom were Assistant Attorney General Shirley D Peterson, Mildred L. Seidman, and David Gustafson,

Washington, D.C., for defendant.

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OPINION

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BRUGGINK, Judge,

This is a claim for refund of $100.00 in taxes which plaintiff has paid toward a $20,691.38 penalty assessed against him under § 6672 of the Internal Revenue Code ("the I.R.C."), 26 U.S.C. § 6672 (1982). Defendant has counterclaimed for the balance of the assessment, plus interest, for a total amount of $21,697.07.

There are two issues. The first is whether plaintiff, while a corporate officer of the now dissolved Florida Corporation, Chrisandrea, Inc., was, pursuant to I.R.C. § 6672, under a duty to collect, account for, and pay over to the Federal Government Federal Insurance Contributions Act ("FICA") taxes and income taxes (collectively "trust fund taxes") which were withheld from the wages of

Chrisandrea employees. The second issue is whether, if plaintiff was under such a duty, his failure to pay trust fund taxes was willful.

The matter was tried on October 2 and 3, 1989. After consideration of the evidence and relevant law, the court concludes that plaintiff was under a duty to collect and pay withheld FICA and income taxes, and that the failure to pay the delinquent taxes was willful.

BACKGROUND

Plaintiff is a former truck driver from Lansing, Illinois. In the summer of 1983, after 14 years of employment with Western Transportation's tractor-trailer unit, plaintiff was on disability and was interested in investing in a business. Plaintiff had collected a considerable sum from workman's compensation, and in addition had funds available from savings, stocks, and

inheritance. Plaintiff's only prior business experience was operating a small tavern in Illinois with his wife. That business operated with no employees, and all tax matters were handled by an accountant.

In September 1983, a friend informed plaintiff that Fred Wleklinski, who at the time was employed as a purchasing agent for the Kapok Tree restaurant chain in Clearwater, Florida, might be interested in entering the restaurant business in Tampa, Florida. Plaintiff met with Wleklinski in Tampa. Wleklinski informed plaintiff that he had significant experience in the restaurant business, and that he had acquaintances in Tampa who were also familiar with the restaurant business.

While in Tampa, plaintiff investigated an opportunity to take over the food and beverage operation of the Bayfront Concourse Hotel in St. Petersburg. After a promising meeting with Darrel Wilde, the hotel's general

manager, plaintiff met with Wleklinski and two of Wleklinski's business associates, Manuel Van Vures, who was then general manager of the Kapok Tree restaurant in Clearwater, and Steve Havrilla, the Kapok Tree's chef. With the help of Thomas P. Panichi, plaintiff's attorney from Lansing, the four formed a Florida corporation, Chrisandrea,[1] Inc., to run the food and beverage operations at the Bayfront Concourse. The corporation officially came into existence on September 14, 1983.

Plaintiff was named President of Chrisandrea. Van Vures was made Vice-president, Havrilla became Treasurer, and Wleklinski was named Secretary. The same four men also constituted Chrisandrea's directors. It is clear from trial testimony that the titles each of the four investors held were

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[1]. The name "Chrisandrea" was derived from the first names of plaintiff's two daughters.

mere formalities. No one was entirely clear as to the responsibilities asscciated with their positions, no formal directors' or officers' meetings were held, and no minutes or other records were kept of any discussions among the four.

The four men each received a 25% interest in Chrisandrea. Van Vures, Wleklinski, and Havrilla received their shares in exchange for expertise and service--Van Vures was to be general manager, Havrilla head chef, and Wleklinski purchaser of food, beverages and other supplies. Plaintiff received his 25% share in Chrisandrea in exchange for contributing capital. Plaintiff was the sole contributor of capital. Although plaintiff was President, it was expected that he was to be merely a "silent investor," helping out when in Tampa, but leaving the day-to-day operation of Chrisandrea to the other three.

Once Chrisandrea's operations began, plaintiff's role as a silent partner ended.

From the very outset, plaintiff spent a considerable time at the Bayfront Concourse overseeing the operations of Chrisandrea. Judith Schwing, Chrisandrea's office manager, testified that "it seemed like he was there all the time." Van Vures testified that plaintiff was present 85-90% of the time. Plaintiff himself admitted that he made several trips to Tampa because he wanted to observe Chrisandrea's operation in the hopes of learning the restaurant business. He had use of one of the desks in Judith Schwing's office.

Plaintiff did not assume any specific duties at Chrisandrea. He did, however, occasionally hire entertainers. Also, like Chrisandrea's other officers, he was authorized to sign checks, and did sign payroll and other checks when approached by office manager Judith Schwing. (Schwing testified that when she needed a signature, she would get one from whichever of the four

she could find.)

Even though plaintiff had no specific duties at Chrisandrea, he was the recognized "money man," and was apparently the boss. Schwing testified that although all the partners were authorized to sign checks, she felt sure that plaintiff had the last word as to where Chrisandrea's money went. She also testified that if there ever had been a conflict among the four partners, she would have abided by plaintiff's instructions. Plaintiff testified that he would take from Chrisandrea's petty cash for personal use. Apparently none of the others did.

From testimony at trial, as well as the stipulation of facts, it is clear that plaintiff's authority extended beyond financial matters. Although Van Vures was in charge of hiring and firing, for example, plaintiff on one occasion overrode Van Vures' decision to fire a particular bartender because in plaintiff's view that bartender was

"good for business." On another occasion plaintiff, after hearing of the friction between Van Vures and the hotel manager Wilde, direct Van Vures not to deal with Wilde. Thereafter plaintiff served as the sole liaison between Chrisandrea and Wilde. In another instance, plaintiff moved a cocktail waitress hired by Van vures into Chrisandrea's office area after plaintiff learned that she had accounting experience.

Regarding payroll, Schwing worked directly with Chrisandrea's accountants, ADP Payroll Company ("ADP"). She would forward to ADP a time sheet on which each employee's hours had been recorded. ADP would then provide Chrisandrea with a set of printed, unsigned payroll checks along with a computer printout showing each employee's name, net wages, gross wages, income tax withholding, and FICA. Plaintiff signed payroll checks for 4 of the 12 pay periods during which Chrisandrea was in existence.

From its inception, Chrisandrea consistently lost money. By late November 23, 1983, he decided to terminate Chrisandrea's operations. Havrilla, Wleklinski, and Van Vures voluntarily assigned to plaintiff their interests in the stock of Chrisandrea, and resigned as officers. The parties have stipulated that plaintiff assumed control of Chrisandrea's operations on this date. Judith Schwing remained with the corporation until it ceased doing business on December 23, 1983. She testified that sometime after Schultz took control, she gave him for the first time a list of creditors. The Internal Revenue Service ("I.R.S." or "Service") was not on that list.

Plaintiff hired an attorney, Kent Whitmore, to aid in winding up Chrisandrea's affairs. On December 6, 1983, plaintiff signed a tax return form, prepared for him by Whitmore, with respect to the third quarter of 1983. The third quarter begins July 1 and

ends September 30. Consequently, Chrisandrea was only in operation for the last 16 days of the third quarter. The tax return indicated that Chrisandrea owed the I.R.S. $2,605.74. Although Chrisandrea's bank account showed an available balance on December 6 in excess of $78,000, plaintiff did not pay the amount shown due on the tax return form. Plaintiff testified that he signed the form on Whitmore's advice, that he was aware of the liability at that time, but that he was very distraught and does not know why the taxes were not paid. As to the large balance, plaintiff testified that he had received most of this money from a dividend, paid to him and his wife. His intention was that $14,000 of the amount received as a stock dividend was to go to Chrisandrea as a loan. The rest was to be returned to his wife.

Plaintiff testified that he was not aware of Chrisandrea's tax liability before December 6 when he signed the third quarter tax return.

On cross examination, plaintiff was asked if he remembered testifying during a deposition that in late November or early December he saw brown I.R.S. envelopes on Van Vures' desk. Plaintiff responded that he remembered seeing the envelopes, but that he did not know they were from the IRS. In rebuttal, defendant read into the record the relevant portions of the deposition:

> "[Schultz:] I noticed these envelopes on the --these brown envelopes on the corner of the desk. Many [sic] Van Vures was sitting behind the desk. And he said nothing. And he just took them and threw them off to the side.
>
> Then I asked Fred [Wleklinski], 'What the hell are these papers?' He said, 'Talk to Many [sic] [Van Vures] about it' . . . . I opened them up and it said Internal Revenue Service on it it. And I opened it up and I said, 'Do you owe them some money, do we owe them some money.' He said, 'I don't know, not that I know of.'

Tr. 65-66. During trial, plaintiff attempted to explain his deposition testimony stating, "I did not learn [of the tax liability] at the

time." Tr. 68. The court notes that paragraphs 15, 16, and 17 of the complaint state, in substance, that plaintiff knew at least by late November that the taxes were unpaid and returns had not been filed. While the evidence is not conclusive that plaintiff actually knew Chrisandrea was delinquent in paying its taxes when he saw the brown envelopes in late November or early December, the court is satisfied that plaintiff knew Chrisandrea had been contacted by the Internal Revenue Service. The court also holds that because the incident involved Van Vures, it must have occurred prior to November 23, 1983, the date on which Van Vures and the others left.

In May of 1985, the I.R.S. made a § 6672 penalty assessment against plaintiff in the amount of $20,691.38, representing the unpaid trust fund employment tax liability of Chrisandrea for the third and fourth quarters of 1983, $1,822.24 and $18,869.14,

respectively. In June of 1986, plaintiff made a $100.00 payment against his § 6672 penalty assessment. He thereafter timely filed a claim for refund. On January 12, 1987, the Service made an interest assessment of $1,275.69, and on February 9, 1987, plaintiff filed his complaint in this court.

In 1985 the other three officers of Chrisandrea were each assessed a penalty under § 6672 in the amount of $14,442.19, representing Chrisandrea's trust fund liability for the period prior to November 23, 1983, during which the three were deemed by the Service to be (jointly with plaintiff) responsible officers.[2] Fred Wleklinski paid $5,776.88 toward his penalty. This amount, by agreement with the Service dated December 14, 1985 (and as reflected in the Transcript of Account offered into evidence by the

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[2]. As discussed more fully, infra, the Government is only entitled to one 100% satisfaction of the penalty.

Government[3]) was treated as 100% satisfaction of his penalty. The Transcript of Account for Havrilla indicates that he has paid $5,289.56[4] toward the $14,442.19, and that the remaining $9,152.63 has been abated. His Transcript also indicates that there is a refund claim pending, although at trial he could not recall filing such a claim, either himself or through his accountant. There is no indication in the record, that the claim has been denied. According to the Transcript of Account for Van Vures, the entire $14,442.19 penalty assessed against him has been abated. There is no indication of any payment by him, but there is

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[3]. Wleklinski's Transcript shows an abatement of $8,665.31. This is the difference between the total penalty of $14,442.19 and the $5,776.88 paid.

[4]. The Transcript of Account for Havrilla indicates payments in excess of $5,289.56. Because $9,152.63, the difference between $14,442.19 and $5,289.56, is the amount ultimately abated, the court will treat only $5,289.56 as going toward Havrilla's penalty.

indication of a claim pending.

DISCUSSION

Employers are required to withhold from their employee's wages income taxes and FICA taxes. I.R.C. §§ 3101(a), 3102 (a), 3402(a). There is no general requirement that the sums withheld be segregated from other funds available to the employer, or that they be deposited in a separate bank account. Slodov v. United States, 436 U.S. 238, 243 (1977). Instead, these funds are deemed to be a "special fund held in trust for the United States," I.R.C. § 7501(a), and are commonly referred to as "trust fund taxes." Slodov, 436 U.S, at 238. The I.R.S. credits an employer for the amount of income taxes which are required to be withheld, regardless of whether the employer ever actually pays these withheld funds over to the United States. See Dougherty v. United States, No. 380-85T (Claims Court October 11, 1989), slip opinion at 7 (citing I.R.C. §§ 1462, 3102(a)). To

facilitate collection when an employer does not pay its trust fund taxes, I.R.C. § 6672 imposes personal liability upon the person who was responsible for seeing that taxes were paid:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall . . .be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

The term "person" as used in § 6672 "includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member, is under a duty to perform the act in respect of which the violation occurs." I.R.C. § 6671(b). The definition of "person" is meant to facilitate the collection of taxes from those who are ultimately responsible.

See Robert White v. United States, 178 Ct. Cl. 705,771, 372 F.2d 513, 516 (1967) (citing, inter alia, Dillard v. Patterson, 326 F.2d 302 (5th Cir. 1963)).

A person who is under a duty to collect and pay any tax to which § 6672 applies is referred to as a "responsible person." This term is a creation of the courts, rather than a statutory definition, and is uses as a matter of convenience. See Slodov, 463 U.S. at 246 n.7. One is not liable, however, merely because he or she is a responsible person when § 6672 taxes are not paid. To be liable, a person must willfully fail to pay any delinquent taxes. White, 178 Ct. Cl. at 778, 372 F.2d at 520-21. The inquiry under § 6672 is thus twofold--whether plaintiff was a responsible person and, if so, whether he willfully failed to pay Chrisandrea's delinquent trust fund taxes.

A. Was plaintiff a responsible person?

Counsel for plaintiff conceded at trial

that plaintiff was a responsible person after he took control on November 23, 1983, Tr. 329, and does not argue otherwise in its post-trail brief. The court therefore need only consider whether plaintiff was a responsible person before November 23, 1983. In making such an examination, the court must attempt to determine where the ultimate authority for the decision not to pay the taxes actually lay at that time, that is, who had the final word regarding which bills or creditors should be paid? White, 178 Ct. Cl. at 771, 372 F.2d at 516 (citing, inter alia, United States v. Graham, 309 F.2d 210 (9th Cir, 1959), cert. denied, 363 U.S. 803 (1960); Schweitzer v. United States, 193 F. Supp. 309 (D. Neb. 1961)). This is primarily a factual inquiry. See Bauer v. United States, 211 Ct. Cl. 276, 286, 543 F.2d 142, 148 (1976).

There is ample indication in the record that plaintiff had ultimate authority and that, had he chosen to do so, he could have

directed the payment of funds to avoid Chrisandrea's tax default. Judith Schwing testified that in a conflict she would have followed Schultz over the others. Furthermore, plaintiff clearly could, and in fact did, undermine the authority of Van Vures, the designated general manager, when he felt it to be necessary. Plaintiff took from petty cash for personal use. He exercised final personnel authority when he chose. Finally, it is noteworthy that it was plaintiff who, without seeking approval form the others, decided that the operations would stop. There is no evidence that plaintiff ever deferred to the authority of the others. Rather, the evidence supports a finding that he did what he pleased at Chrisandrea. He could have used this authority to direct the payment of taxes.[5]

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[5]. Van Vures may also have had authority to direct the payment of bills and taxes, and perhaps could have avoided the default as well. This however, does not relieve

Plaintiff argues that under Godfrey v. United States, 748 F.2d 1568 (Fed. Cir. 1984), he should not be found a responsible person. In Godfrey, the Federal Circuit overturned the Claims Court's determination, 3 Cl. Ct. 595 (1983), that the plaintiff was a responsible person. Plaintiff in that case was a director and "the single most important individual directing the business affairs of the corporation." 748 F.2d at 1575 (quoting 3 Ct. Cl. at 605-06). He was the one to whom everyone looked for ultimate financial and other management decisions. Id. at 1574. He had the ultimate say on who was hired or fired, and knew the corporation was running behind on its tax obligations to the IRS. Id.

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plaintiff of his duty. See White, 178 Ct. Cl. at 775, (quoting Scott v. United States, 173 Ct. Cl. 650, 657, 354 F.2d 292, 296 (1965) ("'realistically read, [section 6671(b)] encompasses all those who are so connected with a corporation as to have the responsibility and authority to avoid . . . a violation of [section 6672], even though liability may thus be imposed on more than one person.'").

The Federal Circuit held, however, that reversal was mandated because "[t]he Claims Court effectively held that Godfrey's status as a chairman cum advisor-negotiator--and the respect and deference accorded that status--amounted to 'ultimate authority' or 'power to control . . . .'" Id. at 1575 (emphasis in original). The case law, the Federal Circuit held, would not support such a holding:

> In no case has an outside director of a publicly held corporation, who neither signed nor had the authority to sign checks, who did participate in the day-to-day fiscal management of the corporation, who did not control the payroll, who did not determine which creditors would be paid and which would not, and who did not own a significant fraction of the corporations voting securities, been held a "responsible person."

Id.

Godfrey does not dictate a different result here. It is not plaintiff's position as president which leads the court to conclude he was a responsible person. The titles of

Chrisandrea's officers in fact meant little. Instead, the court concludes that plaintiff actually possessed and exercised ultimate authority, and that he could have ensured that taxes were paid. Godfrey, furthermore, is distinguishable in that it involved an outside director of a publicly held corporation. Chrisandrea was a small, closely held corporation in which plaintiff was involved from the inside.

The court concludes that plaintiff was a responsible person during the period before November 23, 1983.[6] Plaintiff has conceded

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[6]. There is an early line of cases which suggests that even if a corporate officer has ultimate authority to direct payment of taxes and other bills, delegation of that authority will shield the officer from liability. See Wiggins v. United States, 188 F. Supp. 374 (E.D. Tenn. 1960); Cushman v. Woods, 149 F. Supp. 644 (D. Ariz. 1956); Carroll v. United States. 5 A.F.T.R. 2d (P-H) 523 Supp. 826, 829 (E.D. Mich. 1962). Those cases are not applicable here. First, the court notes that recent cases often do not recognize the delegation exception. See Grover v. United States, 61 A.F.T.R. 2d (P-H) 88-1234, 88-1237 (D. Mass. 1987). Second those cases that apply the delegation argument do so in a

that he was a responsible person after that date. Plaintiff therefore was under duty to collect and pay Chrisandrea's taxes during its entire existence.

B. Willfulness

Having concluded that plaintiff was a responsible person, it remains to decide whether plaintiff willfully failed to pay over to the Government the taxes owing. Willfulness for purposes of § 6672 has been defined as "a deliberate choice voluntarily, consciously, and intentionally made to pay other creditors instead of paying the Government." Godfrey v. United States, 748

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restrictive manner. See, e.g., Dougherty v. United States, No. 380-85T (Claims Court October 11, 1989), slip op. at 19 ("a delegation is only effective if it is comprehensive as to power and authority and the ultimate control over corporate management is placed completely in another officer.") Even if plaintiff did attempt to delegate the duty to pay taxes to Van Vures or Judith Schwing, the court is satisfied that he retained his "power to compel or prohibit the allocation for corporate funds," Godfrey, 748 F.2d at 1575, and that any delegation, therefore, was ineffective.

F.2d at 1577, quoting White, 178 Ct. Cl. at 778-79, 372 F.2d at 521 (1967). Once a taxpayer has acquired knowledge of the tax liability, payment to other creditors with this knowledge is deliberate, and therefore willful. Wood v. United States, 711 F.2d 729, 736 (5th Cir. 1987) (citing Howard v. United States, 711 F.2d 729, 736 (5th Cir. 1983)) ("[a] considered decision not to pay the taxes owed, evidenced by payment to other creditors with the knowledge that the withholding taxes are due, establishes willfulness.") Willfulness, however, must also be viewed in light of the "personal fault" of the plaintiff, see Godfrey at 1577 (citing Slodov v. United States, 436 U.S. at 254), and relevant evidence bearing on personal fault cannot be ignored. Id. (citing Feist v. United States, 221 Ct. Cl. 531, 607 F.2d. 954, 962 (1979)).

Plaintiff in this case knew of Chrisandrea's tax liability no later than

December 6, 1983, when he signed the third quarter tax return. Plaintiff executed a total of six checks after December 6. Five of these checks--to Sharon R. Schultz on December 7, to Bob Werner on December 9, to Carr Brothers on December 15, to Starlite Lamp on December 15, and to Kent Whitmore on December 20--are to creditors of Chrisandrea.[7] The court therefore is satisfied that plaintiff, with knowledge that Chrisandrea's taxes were due, made payment to creditors other than the United States. This deliberate preference of other creditors, furthermore, was plaintiff's personal fault because he was the sole person in control of Chrisandrea when the payment were made.[8]

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[7]. The other check, for $9,900.00, was to "Cash".

[8]. The court notes additionally that between December 6 and December 20, Chrisandrea's account balance at the Park Bank of Florida never went below $20,000, and was

At the very least, plaintiff's conduct was in reckless disregard of an obvious and known risk that taxes were not being paid. Under § 6672, this is willful conduct. Godfrey, 748 F.2d at 1577. The Seventh Circuit, in Wright v. United States, 809 F.2d 425, 427 (7th Cir. 1987), set out a test for deciding when a taxpayer has been reckless: "the 'responsible person' is liable if he (1) clearly ought to have known that (2) there was a grave risk that withholding taxes were not being paid and if (3) he was in a position to find out for certain very easily." In this case plaintiff ought to have known when he

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over $78,00 on December 6, the day the third quarter return was signed. Although plaintiff testified that the high deposit of a stock dividend payable to himself and his wife, and that he was only making a loan of $14,00 to Chrisandrea at that time, the balance on December 1, the day before the sudden surge in available cash, was $9,823. This, coupled with the $14,000 loan admitted by plaintiff would have made over $23,000 available to Chrisandrea. Chrisandrea, therefore, had the ability to pay all the taxes due.

signed the third quarter tax return without making any payment that there was "a grave risk that withholding [indeed, all] taxes were not being paid.'[9] On December 6, there simply was no one else to pay these taxes. Plaintiff, furthermore, was in a position to find out for sure whether taxes were being paid--he could have checked with his attorney.

It might be argued that because plaintiff only signed a tax return for the third quarter[10], he was alerted to the third quarter tax deficiency only; that therefore he could only have acted willfully with respect to the

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[9]. Indeed, he should have known that taxes were not being paid when he saw the brown envelopes in late November. See Wright v. United States, 809 F.2d at 427 (in discussing the meaning of recklessness, the court states, ". . .the purpose of the statute would be thwarted, just by, . . . adopting a 'hear no evil--see no evil' policy.

[10]. In February of 1984, two months after Chrisandrea was dissolved, plaintiff signed the tax return for the fourth quarter of 1983. There is no indications from the record that he made any payment toward Chrisandrea's unpaid trust fund taxes at that time.

taxes shown there, and not as to the larger, fourth quarter deficiency. The court, however, rejects that contention. The third quarter tax return should have alerted plaintiff to a tax problem generally. Line 15 of the return states, "Enter here and pay to the Internal Revenue Service -- $2,605.74." Even a taxpayer of plaintiff's modest experience would have had to wonder whether this small amount represented all the taxes owed by Chrisandrea. At the very least, plaintiff was reckless regarding fourth quarter taxes--plaintiff ought to have known, after seeing the third quarter tax returns, that there was a grave risk that taxes in general (and hence, the fourth quarter taxes) were not being paid, and he was in a position to find out for certain by asking his attorney.

In holding plaintiff liable for all taxes accrued since Chrisandrea's inception in September, even though the parties have

stipulated that he only assumed control on November 23, this court is not in conflict with the spirit of Slodov, 435 U.S. 238. In Slodov, the Supreme Court held that a taxpayer who assumes control of a corporation is not liable for trust funds accumulated and dissipated by predecessors. The taxpayer was permitted to use funds acquired after he assumed control to pay creditors instead of paying the trust fund taxes accumulated before his arrival. The present facts are distinguishable. In Slodov, the taxpayer came in as a complete outsider. His assumption of control therefore marked the beginning of his responsibility to collect and pay taxes. In contrast, plaintiff in this case was a responsible person throughout Chrisandrea's existence. The only significance of November 23, 1983, therefore, is that afterwards the other three owners were no longer co-officers. No basis exists here for isolating the period

of time prior to plaintiff's assumption of control.[11]

Although plaintiff is liable for the full amount of the penalty assessed against him, the Government is entitled to only one "successful satisfaction" of the 100% penalty assessment. Gens v. United States, 222 Ct. Cl. 407, 415, 615, F.2d 1335, 1339-40 91980), cert. denied 459 U.S. 906 (1982). "Successful satisfaction' is the right to retain the

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[11]. It might be argued, of course, that there is a basis for segregating the trust funds accrued in the theory that Slodov applies when, as here, a person only becomes willful as of a certain date (in this instance by acquiring knowledge no later than December 6). That argument has been squarely rejected. See Garsky v. United States, 600 F.2d 86 (7th Cir. 1979). In Garsky, the court held that a responsible person cannot be relieved from liability for taxes accrued and dissipated before he becomes aware of the failure to pay such taxes. In so holding, the court stated, "Slodov does not relieve a 'responsible person' of the responsibility to reduce the accrued withholding tax liability with funds acquired after the funds actually withheld have been dissipated so long as the person responsible has been so throughout the period the withholding tax liability accrued and thereafter," 600 F.2d at 90.

collected assessment, see id. at 415, 615 F.2d at 1340, and is obtained when the statutory period for commencement of a refund suit has expired or, if a refund suit has been filed, when there has been a final adjudication. Id. There is a two year stature of limitations for filing a refund claim on a § 6672 penalty assessment. See Uslife Title Insurance Co. v. Harrison, 784 F.2d 1238 (5th Cir. 1986).

Wleklinski has paid $5,776.88 toward his penalty. According to his Transcript of Account (and as conceded by the Government in its post-trial brief at page 10) he has not filed a claim for refund. Havrilla has made payments totalling $5,289.56 toward his $14,442.19 penalty. The Transcript of Account for Havrilla (as well as Van Vures, who has made no payments), however, indicates a claim pending. Thus it is only with respect to Wleklinski that the two year limitations for filing a refund has passed, and that the Government has the undisputed right to retain

any money it has collected. Plaintiff's penalty will therefore abate by $5,776.88, which represents that portion of Chrisandrea's total liability on which the Government has obtained "successful satisfaction."

CONCLUSION

Plaintiff was a responsible officer during the entire time that Chrisandrea was in existence, and willfully failed to pay that corporation's trust fund taxes. He is liable for the full $20,691.38 in unpaid trust fund taxes less $5,776.88, plus interest. Accordingly, the clerk is directed to enter judgement for the defendant on its counterclaim in the amount of $14,914.50, plus accumulated interest. Plaintiff's claim is dismissed.

/S/ ERIC G. BRUGGINK

ERIC G. BRUGGINK

Judge

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

90-5065

JAMES A. SCHULTZ,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

JUDGEMENT

ON APPEAL from the United States Claims Court in CASE NO(S). 68-87T

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED.

ENTERED BY ORDER OF THE COURT

/S/ FRANCIS X. GINDHART, CLERK

Francis X. Gindhart, Clerk

COSTS: Against, Appellant.

PRINTING----------$283.16

TOTAL----------$283.16

ISSUED AS MANDATE: November 21, 1990

IN THE UNITED STATES CLAIMS COURT

No. 68-87 T

JAMES A. SCHULTZ

v. JUDGEMENT

THE UNITED STATES

Pursuant to the opinion of January 18, 1990, directing entry of judgment for defendant on its counterclaim,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that defendant recover on its counterclaim of and from the plaintiff the sum of $14,914.50, plus accumulated interest and plaintiff's complaint is dismissed. Costs to the prevailing part.

Frank T. Peartree

Clerk of Court

January 23, 1990 By: Linda A. Eddins

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Filing Fee is $105.00.